

PART IV

ENFORCEMENT RESPONSE GUIDE

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PART IV

ENFORCEMENT RESPONSE GUIDE

INTRODUCTION

The Enforcement Response Guide discusses the variety of noncompliances and the circumstances (and associated degree of noncompliance) under which the Commission will take action. This guide should be used to select the most appropriate response or set of responses to instances of noncompliance. When making determinations on the level of enforcement response, the staff should exercise professional judgment including consideration of such factors as: the severity of the violation in terms of degree of variance from the permit condition or legal requirement; duration of the violation; previous enforcement actions taken against the violator; and, the deterrent effect of the response on a similarly situated regulated entity. It is also important to consider the impact on the environment and the impact on the integrity of the TPDES program and the availability of resources within the Commission, the importance of the violation in comparison with other violations that must be dealt with by limited resources; and considerations of fairness, equity, and national consistency. In any particular case, these factors may lead to the application of an enforcement response different from that suggested in the guide.

A key element in all enforcement responses is the timeliness with which they are initiated and effect compliance. Given the multitude of types of violations, no time frame has been established which applies to all violations for the initiation and completion of a given response. However, within 30 days of the identification of any violation, the appropriate staff will have determined the appropriate response and any action taken will have been documented. If the noncompliance continues beyond what is considered to be a reasonable period of time for corrective measures to be effectuated, the type of formal enforcement action needed will be established. Generally, the appropriate initial response is one that results in the permittee being returned to compliance as expeditiously as possible, and promotes future compliance.

Levels of Response

There are three possible levels of response to all violations identified in the pervious sections:

- (1) no action at this time;
- (2) informal response; and/or
- (3) formal response.

For every violation identified by VRAC, the Commission will review the violation and determine

the appropriate response. As stated above, for some violations, the response may be no action necessary at this time.

The informal response can be a site inspection by the regional office, a phone call, or a "warning" letter, which will notify the permittee of the occurrence of a violation and include a statement of Commission intent if the violations are not resolved in an expeditious manner. The "warning" letter may also require specific actions to be taken by the permittee within specific time frames. "Warning" letters include letters issued by Central Office staff, and deficiency letters for inspection violations/deficiencies from the Regional Offices.

All Significant Noncompliance (SNC) violations must be responded to in a timely and appropriate manner by the Water Quality Team. The criteria to determine significant noncompliance (SNC) for TPDES violations are as follows:

Significant Noncompliance (SNC Criteria)

1. Effluent Violations of Monthly Average Limits

a. TRC Violations

A 40% exceedance of specific pollutant limits listed in Exhibit A or a 20% exceedance of a specific pollutant limit from Exhibit B at a given discharge point for any two or more months during the two consecutive quarter review period is SNC.

b. Chronic Violations

Violation of any monthly effluent limit at a given pipe by any amount for any four or more months during the two consecutive quarter review period is SNC.

2. Effluent Violations of Non-Monthly Average Limits*

TRC and chronic SNC criteria are the same as for monthly average violations as described in section 1 above. However, the following caveat also applies:

When a parameter has both a monthly average and a non-monthly average limit, a facility would only be considered in SNC for the non-monthly limits if the monthly average is also violated to some degree (but less than SNC).

***NOTE: Non-monthly average SNC applies to all maximum and all average (other than monthly average) statistical base codes.**

3. Other Effluent Violations

Any effluent violation that causes or has the potential to cause a water quality or human health problem is SNC.

4. Non-Effluent Violations

Any unauthorized bypass, unpermitted discharge, or pass through of pollutants which causes or has the potential to cause a water quality problem (e.g., fish kills, oil sheens) or health problems (e.g., beach closings, fishing bans, or other restrictions of beneficial uses) is SNC. In the case of POTWs implementing Approved Pretreatment Programs, failure to implement or enforce those programs is SNC.

5. Permit Schedule Violations

Any failure to start construction, end construction, or attain final compliance within 90 days of the scheduled date is SNC. Also, all pretreatment schedule milestones missed by 90 days or more are SNC.

6. Permit Reporting Violations

Discharge Monitoring Reports, POTW Pretreatment Performance Reports, and the Compliance Schedule Final Report of Progress (i.e., whether final compliance has been attained) that are not submitted at all or are submitted 30 or more days late are SNC.

7. Enforcement Orders

a. Judicial Order

Any violation of a Judicial Order is SNC.

b. Administrative Order (AO)

Any violations of an effluent limit (or other water quality/health impact) established in an AO is SNC. However, when an AO limit is as stringent as an applicable permit limit, the facility is SNC only if the permit effluent SNC criteria, set out in number 1-3 above, are met.

Any unauthorized bypass, unpermitted discharge or pass-through of pollutants which cause or has the potential to cause a water quality problem or human health problem is SNC.

Any schedule or reporting violations listed above in sections 5 and 6 respectively are SNC.

Any violations of narrative requirements or any other violation of concern to the Director is SNC.

Exhibit A - SNC Conventional Pollutants (40% exceedance of limit)

Group I Pollutants - $TRC = 1.4$

Oxygen Demand Minerals

Biochemical Oxygen Demand Calcium

Chemical Oxygen Demand Chloride

Total Oxygen Demand Fluoride

Total Organic Carbon Magnesium

Other Sodium

Potassium

Solids Sulfur

Total Suspended Solids Sulfate

(Residues) Total Alkalinity

Total Dissolved Solids Total Hardness

(Residues) Other Minerals

Other

Metals

Nutrients Aluminum

Inorganic Phosphorus Compounds Cobalt

Inorganic Nitrogen Compounds Iron

Other Vanadium

Detergents and Oils

MBAS

NTA

Oil and Grease

Other detergents or algicides

Exhibit B - SNC Toxic Pollutants (20% exceedance of limit)

Group II Pollutants - TRC = 1.2

Metals (all forms)

Other metals not specifically listed under Group I

Inorganic

Cyanide

Total Residual Chlorine

Organic

All organics are Group II except those specifically listed under Group I.

The enforcement response should reflect the nature and severity of the violation, and, unless there is supportable justification, the response should be a formal enforcement action or a return to compliance by the permittee within one quarter from the date that the SNC violation is first reported on the QNCR. The Water Quality Team, based upon the ESC's decision to pursue formal enforcement, will initiate formal enforcement action before the violation appears on the second QNCR, within sixty (60) days of receipt of the first QNCR. If the Water Quality Team does not act within this time period, the EPA Region VI Office may initiate a formal Enforcement Action implementing the Federal Override justifications as outlined in the Memorandum of Agreement. In the rare circumstances when formal enforcement action is not taken, the Water Quality Team will have a written record that clearly justifies why an alternative course of action was considered more appropriate.

The formal enforcement response, which will be determined at Screening must be one of the following:

1. Expedited Process and development of a 1660 or Findings Administrative Order (AO), with or without administrative penalties;
2. Executive Director's Preliminary Report and Petition (EDPRP) Process and development of an

EDPRP;

3. Direct referral to the Office of Attorney General resulting in a Temporary or Permanent Injunction, or an Agreed Final Judgment; or

4. Direct referral by Commission to State Office of Administrative Hearings to ensure violations are adequately addressed.

Enforcement Response Guidelines:

A. Sampling, Monitoring, and Reporting

Noncompliance/Problem	Circumstances/Severity	Response/Consequence
Failure to sample, monitor, or report (routine reports including sludge reports, DMRs)	Isolated or infrequent	Phone call or "Warning" Letter, reports to be submitted immediately
Failure to sample, monitor, or report (routine reports including sludge reports, DMRs)	Permittee does not respond to letter; does not follow through on verbal or written comments, or commits frequent violations	AO, consider administrative penalty or referral for criminal prosecution
Failure to perform biological testing as required	Isolated or infrequent	"Warning Letter" or AO, consider administrative penalty
Failure to perform biological testing as required	Frequent or continued	AO, consider administrative penalty
Failure to submit final TRE planning or implementation report as required	Submitted within 30 days of due date	"Warning" Letter
Failure to submit final TRE planning or implementation report as required	30 days or more late	AO, consider administrative penalty
Failure to report biological testing results	Submitted within 30 days of due date	"Warning" Letter
Failure to report biological testing results	30 days or more late	"Warning" Letter or AO, consider administrative penalty
Failure to file 24-hour report for effluent violations as required	No known harm	"Warning" Letter or AO, consider administrative penalty

Failure to file 24-hour report for effluent violations as required	Known harm	AO, consider administrative penalty or referral for criminal prosecution
Failure to timely submit noncompliance reports	Isolated or infrequent	Phone call or "Warning" Letter
Failure to timely submit noncompliance reports	Known harm	AO, consider administrative penalty or referral for criminal prosecution
Minor sampling, monitoring or reporting deficiency	Isolated or infrequent	Phone call or "Warning" Letter (Corrections to be made in next submittal)
Minor sampling, monitoring or reporting deficiency	Frequent or continued	AO, consider administrative penalty
Major or gross sampling, monitoring, or reporting deficiencies	Isolated or infrequent	“Warning” Letter (Corrections to be submitted immediately)
Major or gross sampling, monitoring, or reporting deficiencies	Frequent or continued violations	AO, consider administrative penalty
Reporting false information	Any Instance	AO, consider administrative penalty or referral for criminal prosecution
Failure to install monitoring equipment	Isolated or continued	AO, consider administrative penalty

B. Permit Compliance Schedules (Construction phases or planning, including required TRE activities)

Noncompliance/Problem	Circumstances/Severity	Response/Consequence
Missed Interim Date	Will not cause late final date or other interim date	Phone call or "Warning" Letter
Missed Interim Date	Will result in other missed interim dates; violations with valid cause	"Warning" Letter or AO and require documentation for good and valid cause and date/schedule for compliance
Missed Interim Date	Will result in other missed interim dates no valid cause	AO, consider administrative penalty
Missed Interim Date	Will result in missed final date with no valid cause	AO, consider administrative penalty
Missed Final Date	Violation due to <i>force majeure</i>	"Warning" Letter and require documentation of good and valid cause and date/schedule for compliance
Missed Final Date	90 days or more outstanding with no valid cause	AO, consider administrative penalty
Failure to make timely corrective control/treatment decision as part of TRE	Late with valid cause	Phone call or "Warning" Letter
Failure to make timely corrective control/treatment decision as part of TRE	Continued violation with no valid cause	AO, consider administrative penalty
Failure to undertake TRE control/treatment activities as required	Isolated or infrequent	Phone call or "Warning" Letter
Failure to undertake TRE control/treatment activities as required	Frequent or continued	AO, consider administrative penalty

C. Compliance Schedules (Construction phases, TRE activities)

Noncompliance/Problem	Circumstances/Severity	Response/Consequence
Missed deadline	Contained in permit or previous enforcement action with valid cause	“Warning Letter” or AO, consider administrative penalty; require documentation of good and valid cause and date/schedule for compliance
Missed deadline	Contained in permit or previous enforcement action with no valid cause	AO, consider administrative penalty

D. Permit Effluent Limits

Noncompliance/Problem	Circumstances/Severity	Response/Consequence
Exceeding Final Limits	Outside permittee's control (i.e. - upset bypass)	Phone call or "Warning" Letter; require proof of valid cause
Exceeding Final Limits	Infrequent or isolated minor violations	Phone call or "Warning" Letter
Exceeding Final Limits	Infrequent or isolated major violations single effluent limit	"Warning" Letter or AO, consider administrative penalty
Exceeding Final Limits	Frequent violations of effluent limits or bypass	AO, consider administrative penalty
Exceeding Interim Limits	Outside permittee's control (i.e. - upset)	"Warning" Letter; require proof of valid cause
Exceeding Interim Limits	No known harm	AO, consider administrative penalty
Exceeding Interim Limits	Known harm (i.e. - bypass)	AO, consider administrative penalty
Failure to meet interim whole effluent limits	Isolated or infrequent with no known harm	“Warning letter” or AO, consider administrative penalty
Failure to meet interim whole effluent limits	Isolated or infrequent with known harm	AO, consider administrative penalty

Failure to meet interim whole effluent limits	Continued violation with or without harm	AO, consider administrative penalty
Discharge without a permit	Unintentional one time without harm	"Warning Letter" or AO, consider administrative penalty
Discharge without a permit	Intentional one or more times with or without harm	AO, consider administrative penalty or referral for criminal prosecution

E. Regional Compliance Inspections

Noncompliance/Problem	Circumstances/Severity	Response/Consequence
Minor violation of sampling or analytical procedures	Any instance	"Warning" Letter
Major violation of sampling or analytical procedures	No evidence of intent	"Warning" Letter; consider AO
Major violation of any sampling or analytical procedures	Evidence of negligence or intent	AO; consider administrative penalty or referral for criminal prosecution
Violation of permit conditions other than effluent (numerical), and/or schedule of reporting violations	No evidence of negligence or intent	"Warning" Letter; immediate correction required
Violation of permit conditions other than effluent (numerical) and/or schedule of reporting violations	Evidence of negligence or intent	AO, consider administrative penalty or referral for criminal prosecution

F. Quality Assurance

Noncompliance/Problem	Circumstances/Severity	Response/Consequence
Non-submittal of required DMR effluent data	Isolated or infrequent	"Warning" Letter; submittal required immediately

Non-submittal of required DMR effluent data	Continuous violation	AO, consider administrative penalty
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G. Pretreatment: Industrial Users; Commission as the Control Authority

Noncompliance/Problem	Circumstances/Severity	Response/Consequence
Non-submittal of baseline monitoring reports and other required pretreatment reports	Up to 30 days late	Phone call or "Warning" Letter
Non-submittal of baseline monitoring reports and other required pretreatment reports	Greater than 30 days late (SNC)	AO; consider administrative penalty
Failure to properly sample and/or analyze	Isolated or infrequent	"Warning" Letter
Failure to properly sample and/or analyze	Frequent or continued	AO, consider administrative penalty
Failure to give proper notification of slug loading	Any incident	AO, consider administrative penalty
Unauthorized discharge of slug load into collection system	Any discharge	AO, consider administrative penalty
Failure to maintain and have records available	Isolated or infrequent	"Warning" Letter
Failure to maintain or have records available	Frequent or continued	AO, consider administrative penalty
Failure to meet compliance schedule requirements	Violation due to <i>force majeure</i>	"Warning" Letter; require documentation of good and valid cause, and request date and schedule for compliance
Failure to meet compliance schedule requirements	Missed interim date; will not affect final date	Phone call or "Warning" Letter
Failure to meet compliance schedule requirements	Missed final date; Less than 90 days	AO, consider administrative penalty
Failure to meet compliance schedule requirements	Missed final date by 90 days or more; no good or valid cause (SNC)	AO, consider administrative penalty

Violation of general or specific standard or local limit	Minor or infrequent; no known harm	Phone call or "Warning" Letter
Violation of general or specific standard or local limit	Frequent violations or known harm (SNC)	AO, consider administrative penalty
Violation of general standards or local limits	Causes interference or pass through (SNC)	AO, consider administrative penalty
Any noncompliance noted above as SNC	Significantly non-compliant	Annual publishing of IU's violation in local newspaper

H. Pretreatment: Industrial Users; POTW as Control Authority

When the Commission chooses to take direct enforcement action against an Industrial User (IU) and there is an approved local program, the Commission will notify the POTW of its activities and may issue a NOV letter. The range of appropriate formal enforcement response for these IUs would be the same for IUs where the Commission is the control authority, with the exception that the Commission may join the POTW as a defendant in a judicial action under the Texas Water Code §26.121(c).

Noncompliance/Problem	Circumstances/Severity	Response/Consequence
Non-submittal of required pretreatment reports	Late (less than 30 days)	Phone call or "Warning" Letter
Non-submittal of required pretreatment reports	Continued/recurring non-submittal after notification (more than 30 days) (SNC)	AO, consider administrative penalty
Violation of any requirement of an approved pretreatment program, TPDES permit, or pretreatment regulations	Minor; infrequent	"Warning" Letter
Failure to issue/reissue SIU mechanisms as required by approved program	Late, but corrected	"Warning" Letter

Failure to issue/reissue SIU mechanisms as required by approved program	Continued/recurring violation after notification	AO, consider administrative penalty
Failure to sample/inspect SIUs as required by program	Isolated or infrequent	"Warning" Letter
Failure to sample/inspect SIUs as required by program	Continued/recurring	AO, consider administrative penalty
Failure to establish and enforce SIU self-monitoring requirement	Isolated or infrequent	"Warning" Letter
Failure to establish and enforce SIU self-monitoring requirement	Continued/recurring	AO, consider administrative penalty
Failure to appropriately enforce pretreatment standards (categorical standards and local limits)	Isolated or infrequent	"Warning" Letter
Failure to appropriately enforce pretreatment standards (categorical standards and local limits)	Continued/recurring non-enforcement against one or more SIUs	AO, consider administrative penalty
Failure to enforce against instances of pass-through or interference	Any instance	AO, consider administrative penalty
Failure to publish list of significant IUs in significant noncompliance with requirements	Late	"Warning" Letter
Failure to publish list of significant IUs in significant noncompliance with requirements	Continued/recurring	AO, consider administrative penalty
Failure to comply with compliance schedule	Milestone date missed by less than 90 days	"Warning" Letter
Failure to comply with compliance schedule	Milestone date missed by 90 days or more	AO, consider administrative penalty
Failure to maintain and update IU inventory	Isolated or infrequent	"Warning" Letter
Failure to maintain and update IU inventory	Continued/recurring	AO, consider administrative penalty